Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal From The Supreme Court of Florida

BRIEF OF AMICUS CURIAE

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March 23, 1974

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INTEREST OF AMICUS CURIAE

Donald U. Sessions, who files this Brief as amicus curiae with the consent of all parties, is a citizen and resident of the State of Florida; he is a member of the Florida Bar and a member of the Bar of this Court.

His interest in this case is his desire to have a government of the people by the people, without a manipulation of our electoral system and government by the monopolistic combinations who own and/or control the instruments of the newspaper industry. He filed a Brief amicus curiae with the Florida Supreme Court, and a copy thereof was forwarded to this Court by Appellant as a part of the Record of this case.

ARGUMENT

Our system of government is founded upon an electoral system by which the people elect their government officials. We have staked upon it our all. Right conclusions are more likely to be arrived at with an informed electorate than with an electorate whose information has been arbitrarily restricted by the few who own a monopoly of the instruments of the newspaper industry.

The restriction of the dissemination of news and information, by the few who control the instruments of the newspaper industry, can subvert our system of government just as surely as any monopoly can operate to the detriment of the people.

If the small group which controls and monopolizes the instruments of the

newspaper industry are permitted to restrain and abridge the people's knowledge and freedom of expression, then that small group will be able to manipulate elections, and thereby will be able to select only those legislators and governmental executives whose actions will accord with the wishes of the small group. By restricting the information to be released to the electorate, that small group will have constituted itself as a privileged class able and willing to manipulate the people, the election, and the government.

A most significant book, AMERICA, INC., WHO OWNS AND OPERATES THE UNITED STATES (1971) by Morton Mintz and Jerry S. Cohen, The Dial Press, in Chapter 2, details political pressures brought by newspaper-combination monopolies for their own financial benefit,

and lists components and activities of newspaper empires.

The First Amendment freedoms (worship, speech, press, assembly, and petition) amount to the freedom of expression. Freedom of the press is but a part of the freedom of expression. These freedoms were retained by the people for all of the people, and not merely for a select few. The First Amendment did not create a privileged class which, through a monopoly of the instruments of the newspaper industry, would be able to deny to the people the freedom of expression which the First Amendment guarantees.

The First Amendment freedoms of expression constitute a part of a National Trust which must not be surrendered to a private monopoly.

Elections of governmental officials by the people, to result in a selection that is fair and just for all or even for a majority, must be by an informed electorate. This can be possible only when there has been a dissemination of truth, information, and news from various sources.

This Court has held, in Brown v. Piper (1875), 91 U.S. 37, at 42, that "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper."

It is generally known that Knight Newspaper, Inc., an Ohio corporation, is a cross-state and interstate newspaper empire, owning and operating

newspapers in at least seven States. Such information is readily available to the public in Standard & Poor's Corporation Reports in stock-brokers' offices across the nation. These Reports show that Knight Newspapers, Inc., is the third largest combination of newspapers in the nation (based on circulation), and owns and operates the following newspapers:

The Miami Herald
Tallahassee Democrat
Bradenton Herald
Boca Raton News
Orlando Citizen News
Coral Gables Times
The Guide
Florida Keys Keynoter
North Dade Journal
Union-Recorder
Macon News
Macon Telegraph
Columbus Inquirer
Columbus Ledger
Lexington Herald
Lexington Leader
Charlotte Observer
Charlotte News
Philadelphia Inquirer
Philadelphia Daily News
Akron Beacon Journal
Detroit Free Press

Mr. Justice Learned Hand, in United States v. Associated Press (1943), 52 F.Supp. 362, 372, stated that the newspaper industry "serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. * * * 'If one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. * * * The

phrase * * * can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good.' Nebbia v. New York, * 291 U.S.534, 536."

This Court in Associated Press v. United States (1945), 326 U.S. 1, stated "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First

Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

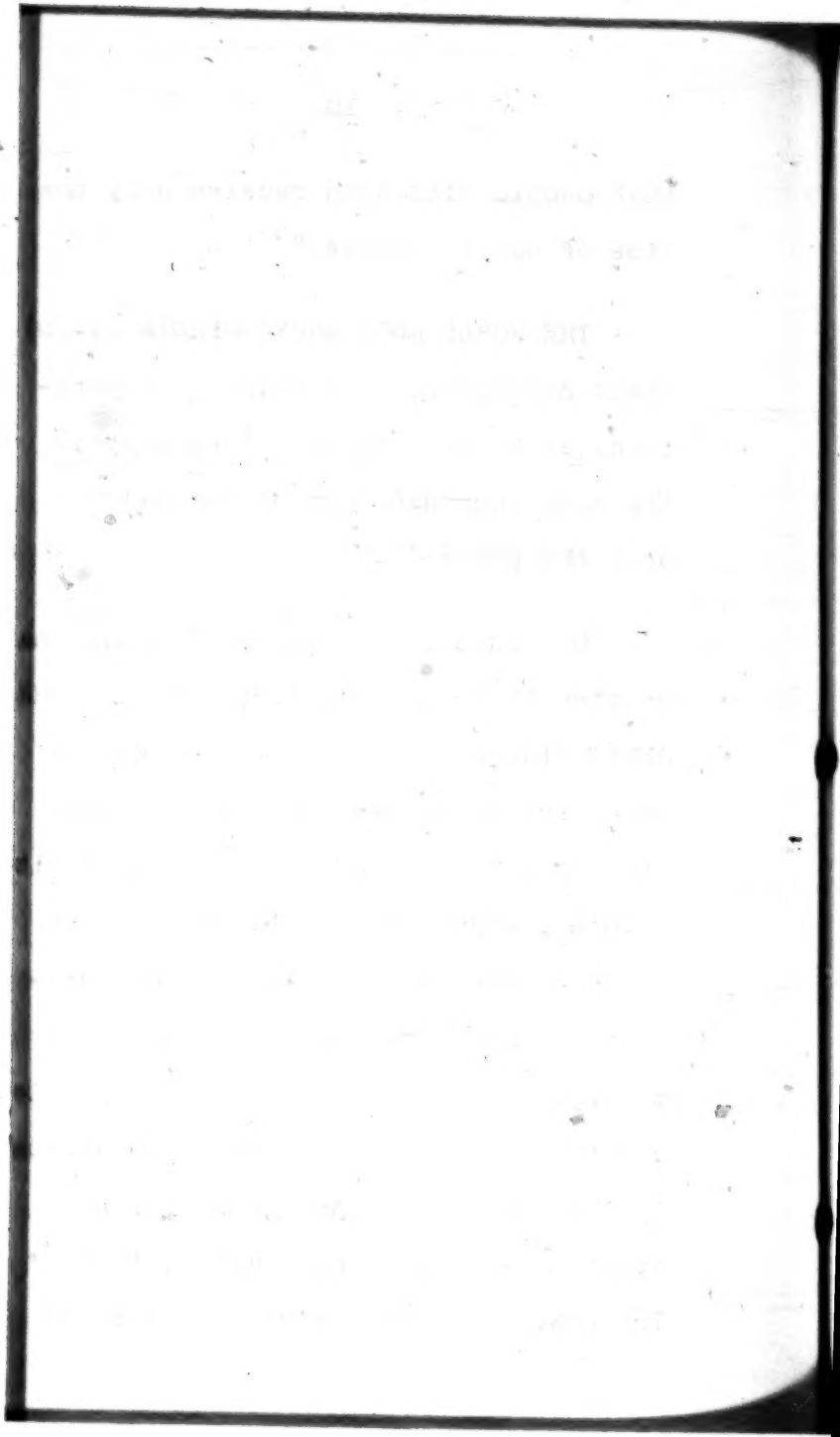
When Appellant, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., established itself in monopolistic control of the newspaper industry in Miami, Florida, and refused to print the material of the Appellee, it abridged the freedom of the press both of the Appellee and the people.

MERIT STUDENTS ENCYCLOPEDIA, Vol. 7 (1972), Crowell-Collier Educational Corporation, states: "A number of persons believe that the greatest challenge to America's free press lies not in interference from the government but in the trend toward fewer and fewer newspapers. They fear that many mergers in the newspaper field will create a monopoly and

that people will then receive only one side of public issues."

THE WORLD BOOK ENCYCLOPEDIA (1970), Field Enterprises Educational Corporation, at F-433, states: "Monopoly is the most thorough form of restraint upon the press."

Mr. Justice William O. Douglas has written in an article contained in THE GREAT RIGHTS (1963), edited by Edmond Cahn, The MacMillan Company: "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude -- and to make money. * * * The newspapers that give a variety of



views and news that is not slanted or contrived are few indeed. And the problem promises to get worse rather better. . ."

Dr. Ben H. Bagdikian, in THE INFORMATION MACHINES, THEIR IMPACT ON MEN AND THE MEDIA (1971), wrote: "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues."

And, in the Introduction to the same work, Dr. Bagdikian wrote: "The men who control these instruments of communication have enormous power. Where once

priests and kings decided what the populace would hear, the proprietors of the mass media now decide. As men gather in ever-larger interdependent masses, communications technology becomes more important and increases the power of those who control it. . "

Stanford Smith, of American Newspapers Publishers Association, before the U. S. Senate Constitutional Rights Subcommittee in 1971, stated: "Freedom of the press is embodied in our Constitution for the benefit of all the people and not as an exclusive prerogative of those who are engaged in the business of news dissemination. . ."

THE HALIFAX REPORTER (Oct.27,1971) of Ormond Beach, Florida, printed an article by Tom Little, of Daytona Beach, Florida, as follows:,

The alarming growth in what appears to be ever increasing abuses of the "freedom of the press privilege", by far too many newspapers, calls for a searching investigation by appropriate agencies to determine if the constitutional rights of our citizens at large are being aborted.

Too many editors and publishers seem to have acquired the idea that the First Amendment has endowed them with a "Divine Right of Kings" to distort and suppress the news at will, and to criticize, censor and condemn our citizens at their pleasure.

How often have we seen some of our newspapers single out a citizen for adverse publicity, then proceed to act as a self-appointed judge, jury and executioner against the accused, even at times denying the accused the right of rebuttal and defense in their papers ?

Our Constitution is an "equitable document". The First Amendment's "right of free expression" is a grant to all citizens. It is not an exclusive gift to editors and publishers, as so many appear to believe.

These editors and publishers, so quick to come to the rescue of each other on First Amendment issues, are always among the first to deny the same right of expression in rebuttal and defense to the very ones they have accused and condemned.

Formerly competition among daily newspapers was the great public protector. Today through consolidation, syndication, the acquisition of radio

and TV Stations and the demise of vast numbers of newspapers, competition rapidly is vanishing and news corporations are acquiring monopolistic influence over huge areas of the country.

All the more reason why a national reappraisal is now imperative.

In Times-Picayune Publishing Co. v. United States (1953), 345 U.S. 594, Mr. Justice Clark pointed out that a newspaper generally receives more than two-thirds of its total revenue from its advertisers, and only the remainder from its readers; that the number of daily newspapers in the United States was then at the lowest point since the century's turn, that daily newspaper competition within individual cities had grown nearly extinct, and that certain monopolistic newspaper business practices had extinguished newspaper competition in many instances.

Morris L. Ernest, a member of the New York Bar since 1912 and for decades counsel for the American Newspaper Guild

and the Authors League of America, in THE FIRST FREEDOM (1946), The MacMillan Company, traces freedom of speech and freedom of the press, and shows the abridgement thereof by those who through monopolies control the newspaper field (and radio and movies). He writes:

"To me the important issue is solely the need of competition in these most significant industries -- which manufacture, distribute and retail food for the mind. In the final chapter I point to many means of reversing the monopoly trend and upsetting the present cartelization of press, radio and movies.

"Having spent much of my life fighting for freedom of thought -- freedom from governmental controls -- I have concluded that we have done a magnificent job in removing government from its historic role of nursemaid to the

mind of man. However, I have recently concluded that far more is kept from our minds by lack of diversity of ownership of the means of communication than by government interference.

"I am convinced that it is not too late to stem the tide. But we must act fast and with bravery. Courts alone cannot do the job. Our Congress must produce a national debate on what to do about our vanishing freedom -- the evaporation of diversity of opinion. If we do not step in soon the totalitarian trend of the world will capitalize on our trend toward monopoly. Then freedom, as we have known it, will vanish from our nation."

The Commission On Freedom Of The Press, in A FREE AND RESPONSIBLE PRESS (1947), The University of Chicago Press, held that "Freedom of the press is

essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure."

The said Commission considered

Newspaper Concentration
Chains
Local News Monopolies
The Communications Empires
News Agencies,Features And Syndicates
Monopolistic Practices
The Cost of New Ventures
The Bias Of Owners

and held that: "The First Amendment was intended to guarantee free expression, not to create a privileged industry. ."

"The greatest difficulty in preserving free communications in a technical society arises from the concentration of power within the instruments of communication. The most conspicuous example of this is in the ownership of instrumentalities. . . The danger is that the entire function of communications will fall under the control of fewer and fewer persons. . . "

In FREEDOM OF THE PRESS (1947) by William E. Hocking, The University of Chicago Press, Archibald MacLeish, one of the members of The Commission On Freedom Of The Press, had this to say:

"Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics. The exclusive exercise of a general right by a limited minority can be justified only if the exercise is of such a character as to realize the general purpose for which the right was established. One of the purposes of the

guaranty of freedom of the press was to assure the publication of the widest possible variety of opinion."

Section 104.38, Florida Statutes, in the interest of all the people, provides that candidates for public office shall have a right of expression when their personal character has been assailed. It does not deny to any candidate a right of expression, and it does not deny to the owner of the instruments of the newspaper industry any right of expression. That statute assures, and does not abridge, the right of expression which the First Amendment guarantees.

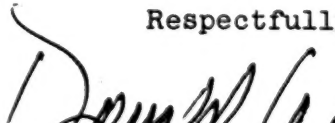
The said Statute is known throughout Florida as the RIGHT TO REPLY LAW. Until now, Appellant and other newspapers have so labeled the law.

CONCLUSION

This Court should determine that Section 104.38, Florida Statutes, was enacted in the general interest as a step toward maintaining for the people a freedom of expression and a system of government by the people, that that statute is not in violation of the Florida Constitution or the United States Constitution, and that that statute required a publication by the Appellant of a reply by the Appellee.

The Judgment and decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,



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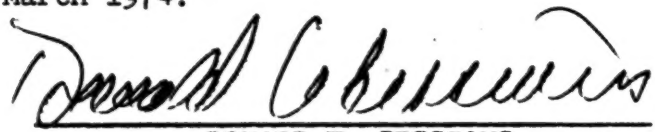
CERTIFICATE OF SERVICE

Donald U. Sessions, as a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the foregoing Brief were mailed by U. S. Mail to PAUL & THOMSON, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131, and that three copies of the foregoing Brief were mailed by U.S.Mail to TOBIAS SIMON and ELIZABETH DuFRESNE, Attorneys for Appellee, 1492 South Miami Avenue, Miami Florida 33130, by depositing the same in the United States Post Office at Daytona Beach, Florida, with first class postage prepaid, addressed as herein stated, this 23rd day of March 1974.



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